ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, AUGUST 27, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations in the Capitol, at 10 o'clock a. m., Senator Irvine L. Lenroot presiding.

Present: Senators Lenroot (acting chairman) and Chamberlain.

STATEMENT OF MR. SAMUEL T. ANSELL—Resumed.

Senator LENROOT. I think, Gen. Ansell, you were narrating your own discipline, or had you finished?

Mr. ANSELL. I was induced yesterday, if the committee please, to depart from what little plan I had and to go into the administration of this system, which, to tell you the truth, I had hardly intended to do at the beginning, although, in view of the attitude that the War Department has taken, namely, that the system is all right and that just the human agencies by which it is administered are largely responsible for any difficulty that there may be, it may be that the administration of the system is rather more important than I thought it was.

The system itself is a system that can not be administered properly. It permits, tolerates, invites maladministration. So I thought I would continue upon the actual administration of this system in the War Department until I got to the organization of the present clemency board, get through that as quickly as I can, and then assure the committee I would go back and discuss the substantive law and its deficiencies and the remedies proposed.

I say that yesterday I was induced to enter into a field of discussion which was really entirely too personal to myself to be agreeable, but which, nevertheless, I believe has its usefulness to the committee and to Congress, and will serve to reveal how a Secretary of War can be induced by an organized military bureaucracy to use the great power of his office to oppress, to destroy, any who would dare differ with that bureaucracy. That is the truth. That, to my mind, will show that justice itself has been outraged in her own temple, the Bureau of Justice, which is a part of the Department of the Judge Advocate General.

The appreciations of justice in the Army truly have never been lower than they are to-day. Most regrettably, they can hardly ex-

pect to improve and become higher as long as the bureau which is charged with the chief administration of justice takes the attitude and indulges in the practices that it does take and indulge in and has taken and indulged in during this war.

The Judge Advocate General's Department is no longer a place of certain and assured justice. All too frequently it is a department given over to base wrong and tyranny, and the oppression of the men and officers who serve in it, and of the Army at large.

I am going far enough into this question of administration to show, I think, that justice is jockeyed around in that department, and it has been degraded to serve the personal purposes of an imperious master, the Judge Advocate General himself. The Army may be small hereafter, and it may be the old type of Regular Establishment or it may be an Army drawn from the people, but justice is certainly a subject that does not grow smaller or less important merely because of the number of men who are affected by it. If justice in a general sense can be said to be the largest interest of man on earth, then I say that justice is the largest interest of the Army.

The gentlemen from the Army and the War Department will be here engaging, and properly engaging, the attention of this committee and of the Congress with plans and programs of reorganization, and of raising and supporting an Army; and yet it seems to me, antecedent to all of those, is this question of military justice, more important than the size of the Army and the kind of Army and the organization of the Army. It may be that I overestimate it; having seen it at too close a range, I may have lost something of perspective; but the assurances of an officialdom, though they mount to the skies, will be of no avail unless justice exists in the Army. Officialdom is the last to hear of or to appreciate or to take steps to remedy injustice. It is a system of which it is a part. Discovery of and reform of injustice usually must come from the outside, from those who are the subjects of the injustice, from their efforts, their relatives, and the interested public generally.

I believe I have talked to more enlisted men than any other man in the Army during and after this war, personally, and it is a matter of the greatest regret to me that I fail to observe any of the enthusiasm among our soldiery that you would naturally expect to possess them, returning, as they have returned, victoriously; and I have talked to men who have not suffered this injustice; I have talked to men who have not been up against it but who have only seen it or sensed it.

The enlisted men of the Army know the Army, are conscious of this subjective effect to orders, laws, and discipline better than anybody else. They always know, and the people will know through them, and they will sense it. And let such injustice go far enough, and we shall be permitted only to hope that hereafter the patriotism of our people will be sufficient to assure willing hands to take up our arms and not hold them listless. It is a subject worthy of the very deepest concern, no matter what personalties are involved or what political aspects it can have. I can not conceive that it has any. It ought not to have any.

It makes no difference about any personal controversies, so far as this system is concerned; but obviously, if one set of men are as

insistent as I am that the system is wrong, and another set of men are equally insistent that it is very nearly perfect, there is bound to be some controversy.

In my communication addressed to the Secretary of War in reply to his and the Judge Advocate General's first defense of military justice [see Exhibit P], a reply which he declined to receive or permit to be published, though he published broadcast their own defense of the system, I said that the subject would never be composed until it was fairly composed, and I said to the Secretary of War what I say now, a fact which he does not seem to appreciate, that it is absolutely impossible for an official, however high, who has committed himself at once and immediately to a strong and strenuous defense of this system without investigation, who has arrayed himself with the solid phalanx of the Army—principally of the Regular Army—in support of this system, to initiate or conduct an investigation that can be fair, and that people will regard as fair.

I said to him, with such respect as the statement could carry in addressing the Secretary of War, that there ought to be an investigation of this subject and of his own part in it. He had appointed the Inspector General, the most reactionary of men—the ultra-militaristic type by virtue of his position, if nothing else, but he is so personally—to investigate the subject of military justice and my connection with it, and my testimony before the Senate committee, of which Senator Chamberlain was then the chairman, and I was called upon to come before the very man whom, in the brief the points of which I read to this subcommittee yesterday, I labeled as prejudiced and reactionary. I showed what his influence had been to maintain this system. I had to handle him as he ought to have been handled, having taken the stand that he had taken. That officer was the officer designated by the Secretary of War to conduct an investigation into the administration of military justice, my part in it and my testimony before the Senate Military Committee. The Secretary does not seem to perceive that, having committed himself, he has committed the entire department. Surely he would not sit in judgment upon a matter in which he had taken such a strong stand.

See how that investigation came along. First, after I had filed my opinion insisting upon subjecting courts-martial to legal regulation, in November, 1917, the Judge Advocate of the Army came back, took charge, relieved me from all connection with military justice, except, of course, when he was away for any period somebody had to act, and I acted; but I mean to say that I was relieved of all authority over that while he was there. While he was there I had nothing to do with it, though all the rest of the department I did have to do with, notwithstanding my great interest in this very subject. All this matter was handled by the Judge Advocate General, a senior assistant of his, a man without experience in the Judge Advocate General's department, in the administration of military justice, and the Secretary of War. At no time was I consulted except as, out of a sense of duty, I went to the authorities.

Then, in the springtime, when it was perfectly obvious that our department was not familiar with the emergency legislation of the nations with which we were associated, and especially not familiar with whatever those nations had done in the improvement of mili-

tary justice and its administration, I asked to be sent to Europe and to be equipped in such a way that I could make this investigation. I was sent to Europe. A single officer to assist me was denied me. I was given a clerk. And after the greatest exertion for between three and four months I returned to this country with a report, not only on the emergency legislation and its administration, but on military justice in those nations with which we were associated; which report never got beyond the Judge Advocate General of the Army.

Recently, however, in January, after this all came to the public, the War Department designates a perfectly inexperienced man who six months before had come from civil life and had manifested no particular quality for the place, unless it be his staunch adherence to the Judge Advocate General and his views, and sent him to Europe with a large staff and much money to make this second somewhat belated investigation; and I understand he is about to return or has returned.

Senator CHAMBERLAIN. Do you object to giving the name of that officer?

Mr. ANSELL. Maj. Rigby.

Senator LENROOT. With reference to this report, which you say never got beyond the Judge Advocate General, it has never been made public?

Mr. ANSELL. It has, now. I have read it into the record; and I will insert that report, with the permission of the committee, right here. The department has to be compelled to do what it does.

ANSELL EXHIBIT "Q."

EXTRACTS FROM GEN. ANSELL'S REPORT UPON MILITARY ADMINISTRATION IN EUROPE.

FRANCE.

The under secretary of state for military justice.

(*a*) *Corresponds to but has broader functions than our own bureau.*—This under secretariat in the French ministry of war, while corresponding to our own bureau, is given a far more prominent place in the establishment than is our department. Shortly after the beginning of war it was raised from the rank of direction to its present status, where it has contact with Parliament concerning its own affairs and an independence of administration unknown to us. While corresponding absolutely to our own department, as far as our department goes, it performs very much broader duties in three respects.

(1) It makes all inspections necessary to acquaint itself with the condition of the administration of military justice in the army and all inspections preparatory to the most important courts-martial and civil litigation.

(2) It conducts before all the tribunals all litigation in which the ministry and the military establishment may be interested.

(3) It is charged with the general inspection and direction of prisoners of war.

It is abundantly equipped for all these functions.

(*b*) *Methods of maintaining discipline in French Army sharply distinguishable from our own in several respects:*

(1) *There is but one kind of court-martial.*—It corresponds to our general court. There seems to be no need of any of the inferior courts because of the established system of disciplinary punishments for all minor offenses. The French tried an inferior court, only to abandon it. Special courts of inferior jurisdiction were provided for by the decree of September 6, 1914, but they were found unsatisfactory, were abandoned in practice, and finally actually

prohibited by the law of April 27, 1918. I was advised that they were opposed principally because it was thought they were the alternate whereby commanders would neglect their duty to impose summary disciplinary punishments, and also because courts-martial might become too frequent.

(2) *The system of summary disciplinary punishment (mentioned above).*—This system is an established, tried, and tested agency of French Discipline. No French officer can be found who disputes its efficacy. It is contended that, properly supervised as it is, (1) it results in effective discipline without the least injustice; (2) develops the proper sense of responsibility of command in all officers and corresponding respect for them upon the part of those commanded; and (3) obviates the great loss of time and energy consumed in courts-martial, leaving officers and members of the command free for their purely military duties. This system of discipline is regulated elaborately and in detail by the decree of May 25, 1910. There is no appeal to the courts. It applies to officers as well as to enlisted men.

There is one feature of the punishments authorized worthy of remark. Corporeal punishment, bodily indignity, or public disgrace is not permitted. The appeal seems to be to the pride and dignity, rather than to the sense of shame. The system carries with it a very wise concurrence of authority and responsibility. Every man must judge as he would be judged. The kind of field punishments habitually indulged in in the British Army have no place with the French. Considering the moral quality of our soldiery, as I have seen it evidenced here, it is my view that we could safely apply the basic principles of the French rather than English discipline.

(3) *There is a far more thorough investigation prior to courts-martial than there is with us.*—This is made by competent lawyers. Complaint of conduct that would subject the offender to court-martial having been made to the convening authority, or charges having been preferred to him, the whole matter, including all the papers, is turned over to a "rapporteur," who is an officer of the bureau of military justice assigned to duty with the command. He makes a thorough investigation and performs all the duties of the juge d'instruccion in the civil system, except that he himself does not finally decide whether the accused shall be subjected to court-martial or not. Upon that question he makes a report, with recommendations, to the convening authority. The convening authority may disagree with the "rapporteur," but in practice he seldom does. If it is decided to proceed to trial, the record of the case as it is made up is submitted to a "commissaire du government," who is also a lawyer appointed by the minister of war, who sits at the trial and represents both the Government and the accused in a sense unknown to us; that is, while he endeavors to see that the Government's case is presented, he is no more a prosecutor for the Government than he is counsel for the accused. He is there to see that justice is done between the State and the accused. This official is described as "a public minister representing justice." He should be at least of the grade of the accused. He is always a lawyer and is usually a man of considerable or even great distinction at the bar. He takes no part in the deliberations of the court. However, the court relies upon him for advice during the trial and may, and frequently does, consult with him during its deliberations, but this must be done in the presence of all parties.

If the papers upon coming to the hands of the "commissaire du government" are defective in stating a legal case, he amends them; if, for any reason they are fatally defective, he quashes them; and if during the trial he should become convinced of the deficiency of the proceeding as a matter of law, he so signifies to the court; in such a case his view is controlling. Even upon the facts the formal expression of his view that the State ought not to prevail is sufficient to work an acquittal or dismissal.

In time of war the two legal functionaries described above are united in a single person—"le commissaire-rapporteur."

(c) *Judgments of courts-martial are subject to an independent revisory* power—

(1) The Court of Cassation has, or until recently had, jurisdiction in time of peace over the judgments of courts-martial only under exceptional circumstances in the case of persons generally subject to military law, but civilians tried by court-martial for State offenses may always in time of peace have their cases reviewed by that court.

(2) A Court of Revision sits in time of peace and war for the Army. The court originally consisted of two civilian magistrates of the court of appeals and three officers of the Army. I am advised at the department that not long

before war broke out there was a change in the situation by decree that permitted an appeal to the Court of Cassation in place of the Court of Revision, and I am advised that in time of peace the Court of Revision had been largely, if not entirely, superseded by that court. In time of war the Court of Revision consists of five officers of proper rank, sitting at the headquarters of the Army or at each Army, as may be necessary.

In time of war there is no appeal to the court of cassation by military persons, and the Government may also, by decree, control appeals in time of war to courts of revision. In August, 1914, all appeals to the court of revision were suppressed. June 8, 1914, revision was reestablished for all judgments of death. On June 8, revision was suppressed again for death sentences imposed for passing or inducing one to pass to the enemy or to rebel armies and for revolt; but, as to these offenses, it was reestablished by the decree of July 12, 1917. By the decree of February 28, 1918, revision was reestablished for judgments of condemnation to hard labor for life and for deportation. The present situation is, then, that there maybe revision of judgments in the following cases: (1) Death penalties, (2) hard labor for life, (3) deportation.

By telegram of April 20, 1917, it was ordered that no capital case, whether it had been revised and rejected, or not revised at all, should be executed until the record had been submitted to the decision of the President. In all these cases the under-secretary of state for military justice submits the record, with his review and recommendation, to the President of the Republic or to the minister of war directly, without the intervention of other authority. By decree of June 12, 1917, the above provision requiring submission of death sentences to the President was temporarily abrogated in certain cases, but by note of July 17, 1917, the rule prescribed by the telegram of the 20th of April, 1917, was reestablished in all respects. The present law, therefore, is that no capital sentence can be executed without the approving decision of the President of the Republic.

I am also advised that cases carrying military degradation of an officer or soldier, dismissal of an officer, or the dishonorable discharge of a soldier are, by reason of the fact that the President is the pardoning power, usually submitted to the department by the general in chief of the Army on his own motion.

Courts of revision do not retry the facts. They will annul the judgment of courts-martial, and in a proper case order a new trial, only in the following cases:

(1) When the court was not lawfully composed.

(2) When it has violated the rules of its jurisdiction.

(3) When the penalty pronounced by the law has not been applied to the facts found to exist, or when a penalty has been awarded not known to the law.

(4) When there has been a violation or omission of forms prescribed to be observed under pain of nullity.

(5) When the court has failed to comply with the request of the accused or the "commissaire du government" to make use of a faculty or fight provided him by law.

(*d*) *An elaborate system of suspension of sentences.*—Except in the most heinous cases, all sentences that would deprive the Army of a man's military service are suspended for the period of the war. There is also an elaborate system whereby an offender may be completely rehabilitated. Commendation in orders will work a complete rehabilitation. Men are not lost to the Army. They serve either in prison works or in the chasseurs d'Afrique in France. Military service thus rendered is penal but is not beyond the realm of rehabilitation. All military persons are amenable to courts-martial exclusively for all violations of law, including the common law of the land, except certain offenses against the fishery and forest laws, in which civil courts have jurisdiction.

ITALY.

Bureau of Military Justice.

The personnel of the Bureau of Military Justice, presided over by a lieutenant general, is purely military. The ranking officers of the department are all eminent lawyers. The system of court-martial procedure is in general respects very similar to the French.

(*a*) *Distinctive features; A court of revision of all judgments of courts-martial.*—The system embraces this distinguishing feature: In accordance with law, the King, by a decree dated the 20th of July, 1917, instituted a supreme

council of revision. Its rules of procedure were promulgated on the 12th of August following. The council was originally composed of one of the generals commanding a section of military justice, who is its president; of the military advocate general of the vice military advocate general; of the colonel attached to the section of justice, of a councilor of the court of appeals, designated by the Minister of Grace and Justice, and an official known as a chief reviewer, chosen by the supreme commander from among the officers of the army who are qualified lawyers. As first established, it had jurisdiction to revise all sentences involving a penalty greater than seven years' imprisonment in all cases where there was not already legal recourse to the supreme tribunal of war and marine. (This latter tribunal has jurisdiction only in exceptional cases.)

In April of the present year this court of revision was reconstructed and enlarged, with a larger number of councilors of the court of appeals, and with jurisdiction to revise all serious penalties. The decree constituting the council expressly provides that the examination in revision will not suspend the execution of sentence. I was advised, however, that upon application, either by the accused or the department of military justice, a stay of sentence could be obtained in a proper case. The jurisdiction of the supreme council of revision is final, except in certain special cases. The records are first presented to the bureau of military justice and by that bureau transmitted for revision. (Concerning this court, see appendix "D" and rough translation.)

ENGLAND.

THE OFFICE OF THE JUDGE ADVOCATE GENERAL.

(1) *History and place in the Government.*—Originally, before the appointment of the commander in chief in 1793, the Judge Advocate General acted as secretary and legal adviser to a board of general officers by the aid of which the government of the army was carried out by the Crown; and it was apparently to discharge the duty of defending the board and the action of the military authorities taken under his advice to this board that the presence of the Judge Advocate General in the House of Commons was needed. When the board was abolished, on the appointment of the commander in chief, the Judge Advocate General continued to be the legal adviser to that official, and though at times, up until 1805, he was not a member of Parliament nor a privy councilor, yet, nevertheless, in the absence of a responsible minister he acted as such and remitted capital punishment and dismissed officers in the name of His Majesty. In order to bring this Crown functionary under parliamentary control, the office of the Judge Advocate General was in 1806 made a political one, the holder became a privy councilor, a minister of the Crown. He had the duty of advising the Sovereign upon all matters coming within the scope of his office and was liable like any other minister to be called to account in Parliament for any act done in the exercise of his official function. From this time until 1851 the Judge Advocate General assumed to act judicially and his decisions were expressed as pointing out the nature of the defects in such language as, "I have the honor to inform you that the conviction can not be legally sustained or enforced," or that the "proceedings are invalid" and recommending or suggesting that "the prisoner be released and the entry of the conviction erased;" or, "that the commanding officer be informed that the finding amounted to an acquittal and should be so recorded in the usual form of 'not guilty.'" In a brief memorandum filed with me by the present Judge Advocate General (Judge Cassel[1]) it is said:

"In the late sixties, however, the form used more frequently took the shape of a direction such as 'Under the circumstances the proceedings are quashed.' 'I have to request that you will cause the prisoner to be released and the record of the conviction erased.'"

(2) *His place as sole legal adviser to the political head of the Department.*—In 1875 a case was submitted to the law officers, Sir John Coleridge and Sir John Jessel, who in effect gave it as their opinion that it was the function of the Judge Advocate General to give advice and not to pronounce judgment, and

[1] Judge Cassel was rather recently appointed. He is an eminent barrister and at the outbreak of war held a prominent place at the English bar as an equity lawyer. He was serving as an officer of the line in France when appointed.

that in constitutional theory "his opinion is not binding, although, no doubt, in practice it is not usual to disregard it." However, this was not followed by the succeeding Judge Advocates General. Judge Osborne Morgan in a minute to the secretary of state in 1880, when he was Judge Advocate General, while accepting in a sense the opinion of the law officers as a theoretical legal definition, nevertheless adopted as the constitutional basis of his office the definition set forth in a minute of his predecessor, Judge Ayrton, under date of the 17th of February, 1874, and held that the Judge Advocate General "was constitutionally as well as morally responsible for the legality of sentences of courts-martial." During all this time the office was a political office of a ministerial character, its holder having a seat in and responsible to Parliament. So it remained until 1873, from which date until 1905 there was an interim in which the office was held by the president of the Probate Divorce and Admirality Division. In 1906 a further change was made and the present system initiated. The Judge Advocate General became a permanent official, debarred like other civil servants from sitting in Parliament, and with direct responsibility to the Secretary of State for War. To quote from the present Judge Advocate General—

"The result is that the responsibility of advising the Crown as to the exercise of the prerogative as respects the sentence of courts-martial is transferred to the secretary of state, and the functions of the Judge Advocate General are to advise the secretary of state as to the advice he shall tender to His Majesy. The secretary of state is at liberty to disregard the advice tendered to him by the Judge Advocate General, but he will rarely, if ever, take the responsibility of disregarding the advice of that official on legal matters."

The law officers of the Government are all agreed that while the office of the Judge Advocate General is theoretically advisory to the secretary of state the disregard of that advice would be so unusual and would be considered so serious a matter that it could not go far without challenging parlimentary correction. It is understood that in a case of exceptional importance the Secretary of State for War may refer the opinion of the Judge Advocate General to the attorney general and the solicitor general and may have their advice upon the question in dispute. This course has rarely been adopted, and I am advised there has been put one reference to those law officers within the last three decades. The reorganization of the office that has taken place within the last 150 years has resulted in placing a responsible minister at the head of the War Department, who stands between the Sovereign and Parliament, and to whom, rather than to the Sovereign, the Judge Advocate General of England reports directly. His opinions are subject to no military supervision or to any other kind, except in the rare instance when his decision may be submitted for the review of the attorney general.

(3) *He is independent of all military supervision and control.*—His sole superior is the political head of the department, namely, the Secretary of State for War, who is responsible immediately to Parliament. The office was originated in necessity as an independent check on military authority. It was established more than 200 years ago, primarily to correct abuses of courts-martial and the exercise of military authority. Court-martial sentences at that time were notorious for their disregard of the fundamental principles of justice of the law of the land. It is fundamentally inherent, therefore, in the establishment of this office that this official shall be amenable to no military authority whatever, but solely to the political departments of government. His appointment by the Sovereign, his authority as defined in the patent of office, his civilian status, he being no part of the military establishment, with life tenure and retirement, all establish his independence of military authority in the performance of the functions of his office. All this nobody in or out of the army disputes and none can be found to question its wisdom. His opinion in matters pertaining to his official function being subject to no military scrutiny or control, he is the final legal authority on the administration of military justice.

(4) *The several deputies judge advocate general.*—The judge advocate general has a deputy judge advocate general in each of the overseas forces; that is, in France, India, Mesopotamia, Macedonia, Egypt, Cyprus, and with the various other expeditionary forces of England. This official, while representing the authority of the judge advocate general is also upon the staff of the commander in chief of the force. There, as at the war office, rarely or never are the opinions of the deputy judge advocate general disregarded. If the commander in chief feels that he must differ with the deputy judge advocate gen-

eral, the question is submitted directly to the judge advocate general himself. The opinion of the responsible law officer is accepted without question by the army. The attitude of the army is one of respect for his authority. This administrative principle has a profound influence upon administrative action. A convening or confirming authority, or any other military authority charged with an independent responsibility, may, and with the utmost freedom in practice does, submit to the judge advocate general or his deputy any question arising in due course of administration, and his opinion is regarded as authoritative by the army and by the department, and will serve as a military justification for the action by that official.

Under the secretary of state for war, alone, the judge advocate general of England is the head of the administration of military justice.

(e) The administration of military justice.

(1) *Thorough preliminary investigation prior to resort to court-martial.*—What is universally pronounced as one great element of strength in the British system is to be found in the thorough preliminary investigation required to be made to determine whether the accused shall be subject to court-martial. After the officer prefers a complaint the commanding officer (usually the regimental commander) conducts a preliminary hearing, at which the accused is present. The witnesses against him are called and examined under oath and cross-examined by the accused. The accused then presents his own witnesses. Upon the evidence thus taken the commanding officer decides whether to dismiss the charge altogether, or whether to resort to his power of summary punishment, or whether to forward the charges to the convening authority for trial. In case he decides to resort to summary punishment, if the offense involves one of the larger summary punishments authorized by the statute, the man must be asked if he submits to the commanding officer's jurisdiction or whether he would prefer court-martial. A well-advised man usually submits to the summary discipline. If he takes a court-martial, or if the commanding officer decides to forward the charges to the convening authority, the substance of what each witness testified to is settled in a conference between the commanding officer or his adjutant and the accused, and upon disagreement the witnesses must be recalled. All this testimony is forwarded to the convening authority, where the judge advocate looks over both the charges and the substance of the testimony and decides whether there shall be a trial or not. If he finds incompetent testimony he indicates his ruling to that effect upon the testimony sheet, or if it appears that an offense has been committed for the proof of which evidence exists but has not been included in the evidence sheet, then the file is returned to the commanding officer for further investigation and again the man has the right to be present and examine the witnesses. At any time before final disposition by the commanding officer he has the right to administer his own punishment or dismiss the charges. All papers, including the evidence sheet, are sent to the president of the court, who must be guided by the rulings of the law officer as to what is relevant and what is not. This testimony sheet also serves as a check upon the testimony of witnesses.

(2) *The punishing power of commanding officer (usually regimental commender).*—Another great element of strength in the British system is found in the punishing power of the commanding officer, which is authorized by section 46 of the army act. The exercise of this power has caused nearly all inferior courts to be superseded and has made the regimental court obsolete. Together with the required preliminary investigation, it is believed to have reduced the resort to general court-martial by about 50 per cent. "The whole trend of army opinion and military jurisprudence," says the judge advocate general, "is toward increasing the power of a commander to administer in a proper case summary discipline."

(3) *The different kinds of courts-martial in practice.*—Courts-martial authorized in the British system are (1) the ordinary general court-martial, (2) the field general, (3) the district court, and (4) the regimental court. Where it is impracticable to maintain the ordinary general court-martial, the field general may be resorted to; and it has been held impracticable to maintain the ordinary general court-martial in France and other fields of service for enlisted men. Officers, however, are almost invariably tried by ordinary general court-martial. The distinguishing theory is that trials of officers are so few as to be within the range of practicability. So, in France and all active fields of service there are (1) the ordinary general court for officers and (2) the field general for enlisted men. At home there are (1) the ordinary general court for

everybody and (2) the district court for enlisted men and the regimental court. The last-named court is obsolete by reason of the summary punishing power, and the district court is infrequently resorted to.

(4) *General and field general courts-martial are provided with law officers, who control the court upon questions of law.*—The ordinary general courts-martial are provided with a judge advocate warranted by the judge advocate general or deputy judge advocate general. The English judge advocate is not, as with us, a prosecutor, but a law officer whose opinion may be taken by the prosecutor (counsel for the government) by counsel for the accused and by the court. He may, and frequently does, give his opinion to the court without their request, and would do so if he believed the court needed it or was about to err. When the evidence is all in he sums up and instructs the court upon the law in very much the same manner as a judge instructs a jury. The judge advocate is usually an eminent barrister who has had experience on the criminal bench.

The field general court is not provided with a judge advocate by law, but it is now the established practice to detail with each field general a member who is especially qualified in the law and who has all the qualifications of the judge advocate just mentioned. Out of deference to the line he is seldom or never made the president of the court, but, on the other hand, neither is he the junior member. While theoretically he has no more power than any other member of the court, under the British system he may spread his own views upon the record and may, indeed, report specially to the deputy judge advocate general any errors committed by the court on the trial.

(5) *Some weaknesses of present system.*—The present British system is weak, the law authorities find, in the following respects:

(*a*) The law does not provide for having a judge advocate on every field general. This difficulty has been obviated largely, as just said, by detailing as "law member" an officer who is an eminent barrister and of experience in the administration of criminal law, specially selected for the purpose of controlling the court in matters of law. The present judge advocate general strongly recommends the supplying of every court-martial, except the summary court, with a legal member, and would recommmend it immediately to Parliament were it opportune to do so.

(*b*) This law member should have a controlling power in matters of law. As just explained, he does have that power in fact, but only at the expense of transcending legal theory.

(*c*) In cases of death sentences the law does not, as it should, provide for a stay of execution until review by the judge advocate general. Inasmuch, however, as death sentences can in no case be confirmed by any authority below the commander in chief, the confirming authority always has the approving view of the deputy judge advocate general. Then, too, as a matter of fact, the deputy judge advocate general will take no risk of future disagreement with his chief post executionem, and, except in the plainest case of a death sentence, he would ask for the judge advocate general's review before sentence is executed.

(*d*) There should be a legal stay of execution for another reason: In order that the accused may request pardon. While every convening and confirming authority has the authority at any stage in the proceedings to ask for the opinion of the judge advocate general, an authority which is very frequently availed of, there is no express authority for staying the sentence or establishing an interval between the awarding of the sentence and its execution in order that the pardoning power may be sought. The recent Army act, however, with this in view, requires the president in all sentences of death to announce the verdict upon conviction, in order that the accused man may pursue his usual remedies or ask pardon.

(*e*) In the matter of settling charges there is an inconsistent relation in that charges are both settled before trial and ultimately passed upon in review after trial by the same legal authority. The present judge advocate general has so organized his office into divisions that the division that settles the charges never reviews the proceedings. In fact, so independent will he keep them that he himself, since he may be called upon to review a case, never personally settles the charges. All such matters, indeed all preliminary matters of this character touching prima facie legality, are attended to by a division which acts independently of the judge advocate general and takes action in the name of its own chief. If it were convenient at the present time to do so, the present judge advocate general would propose the statutory establishment of this independence.

(*f*) No reason is known for the illogical position that inasmuch as an acquittal is required to be announced in the British system immediately to the accused, all convictions should not be announced also.

(6) *Judge Advocate General as reviewing authority.*—The judge advocate general reviews all cases, even those that have been reviewed by the several deputy judge advocates general in the various Expeditionary Forces, though those passed by a deputy are not scanned with such great care. The number of cases now being reviewed are about 1,100 per week, and he tries to keep the work up to date. A case received to-day should be taken up by an examiner to-morrow and passd without delay. He is guided in his power of review by the rules, vague as they are, established by the criminal appeals act as grounds of reversal or quashal. The scintilla of evidence theory has long been abandoned in England, and because of the vagueness of the rules established in the criminal appeals act, the appellate courts have very properly reserved to themselves the right to say what shall constitute grounds of reversal and quashal, keeping in view, of course, so far as sufficiency of proof is concerned, the established common-sense rule in deference to those who have heard the witnesses testify. He not infrequently reverses, however, for insufficiency of proof, and uses the formula found in the criminal appeals act, that is, "There is not a reasonable sufficiency of evidence" or when "a substantial injustice has on the whole case been done the accused."

a. The Judge Advocate General of England has never limited himself to jurisdictional deficiencies in quashing proceedings; he will quash for other reversible error.

b. Practical steps in quashing.—When he decides to quash proceedings he makes what he calls a "minute" of the deficiencies without going so much into detail as we do. In several of the cases I noted he simply said, in a nut-shell statement of the reason for his conclusion, "I find that the charge alleges no offense known to the law;" or "that the only evidence adduced for the Government was incompetent;" or that "the evidence is not reasonably sufficient;" or "the accused was denied the substantial right of counsel and witnesses for his defense;" and that "for this reason the sentence should be quashed," or sometimes, "must be quashed." With but little more, this minute is addressed to the "S. of S." (that is, the Secretary of State for War) who returns the minute initialed. The minute is transmitted by the Army Council to the proper commander with a direction from the Army Council to see that the necessary notation is entered on the record of the accused and that all steps be taken to restore him to his former status.

Even in cases of quashing for defect of jurisdiction he seldom recommends another trial, as he leans decidedly against a second trial in such cases, though in particularly aggravated cases, where obviously the accused should not go unpunished, he does, of course, recommend trial.

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S. T. ANSELL.

Returning from Europe, I found Gen. Crowder away more and more, the control that he exercised when he came back to relieve me from administration of military justice in the fall before became very much relaxed, and I assumed more and more of it. I found that during my absence what I had told Gen. Crowder would happen had happened in regard to General Order No. 7, which I have referred to before as an administrative palliative enabling the department to make a study of these death sentences before they were executed. I found that the officer who had been engaged in this during my absence, a very able officer, indeed—I do not know whether he agrees with me on this subject or not, but an able lawyer and officer—had held, as I say, what I had pointed out to Gen. Crowder as a matter of law would have to be held with reference to General Order No. 7, that we were expressly limited by General Order No. 7—I mean the Office of the Judge Advocate General was limited—to the study or the review of pure questions of law; not passing on them—do not get that idea—but studying on them in

order that we might advise with the commanding general below, and thus endeavor to keep him straight, if he saw fit to accept our advice. But the duties of the Judge Advocate General were so defined there, I said, that we would be limited, in the administration of military justice, to what was set out in that order, and that we would be denied the power, which I deemed to be a very necessary one, in the administration of justice, to recommend clemency to the President of the United States in all cases. So it had been held while I was away that this order acted as a limitation to that effect, and there had been no recommendation for clemency consequent upon these reviews and studies we made since the time of the publication of General Order No. 7 until after I got back.

Senator LENROOT. What had been done with respect to them?

Mr. ANSELL. They just made the review upon the technical questions of law, and sent the study or review to the commanding general.

But you see, regardless of what he might do, Senators, the man who studies this case and this record is in an excellent position to advise the President as to whether clemency ought to be granted or not, regardless of what the legal solution may be.

When I got back I took the bull by the horns, because it was nothing less than that, and I reversed what the acting Judge Advocate General had in my absence very properly, as a matter of law, held to be the limitations placed upon our office to recommend clemency, and instructed the boards to review and recommend clemency in proper cases.

Senator CHAMBERLAIN. To recommend to the President?

Mr. ANSELL. To the President, or to a subordinate commander. I wish to say here that when we began to recommend this clemency to these commanding generals below, it had to be done with a delicacy that does not speak well for justice. They are men of power, supported by the War Department, and they wanted no interference from a mere lawyer, and frequently we got very sharp retorts from them to the effect, "You had better mind your own business; we know what this requires."

Senator CHAMBERLAIN. They were superior in rank to the men who made the recommendations.

Mr. ANSELL. Yes. They are major generals, and at best the head of my office was only a brigadier. But I mention this to show you that by reason of this palliative, notwithstanding the fact that it would be thus interpreted, and the drafter of the order, the Judge Advocate General, had been advised that the order would be thus interpreted as a limitation upon our power inhibiting us to make this recommendation to clemency, it was not changed. It stayed there and operated as an limitation, and it was not changed until I got back here, and as I say, in violation of the proper rules in the construction of an order or a statute, I deliberately changed it, in the interest of justice. The departmental line-up was against the granting of clemency even then, and it has been worse since, notwithstanding that it has been published to the community at large that the special clemency board has been given a free hand to recommend and carry through clemency, a matter which I will take up in a moment.

Senator LENROOT. How did this board come to be designated as a clemency board, if they had no power to make recommendations?

Mr. ANSELL. This clemency board, if the Senator please, was not organized at this time. This board of review was a board of review created by me for the purpose of reviewing, for matters of law, the proceedings of courts-martial, limiting themselves to questions of law; and then when I got back I issued an office order enlarging their jurisdiction so that they could include a recommendation for clemency. That is, they would send one of those studies back to the commanding general, and they might say, "As a matter of pure law, the proceedings are regular, valid. Nevertheless, for these reasons, we think you ought to grant clemency." That was not by the clemency board, you see, Senators. The clemency board came into existence later.

Now, it is true there had always been in the office of the Judge Advocate General an officer who, among other things, passed upon applications for clemency, for remission of penalties, made by our prisoners in the old Regular Army, itself. Prisoners could make these applications every six months. Applications were treated, as a rule, rather perfunctorily. The regulations of the War Department were such as to repress these applications. The entire office had only four or five officers in it, and was not well organized; but in former times there was one officer there whose duty it was to look over the men's applications for clemency; the regular routine performance. There was no officer there and no organization in the Judge Advocate General's Department designed to recommend clemency at the very moment of reviewing the case in the first instance, you see, Senators. So I enlarged this jurisdiction of the board of review for that purpose, notwithstanding the fact that, as I say, General Order No. 7 prohibited it.

Now, we worked along. We were imposed upon by the power of military command, and I assure you nobody in the world knows it better than I. I was at the point of contact between the power of military command and the law; not the gentlemen in my office, but I. I was the official who was answerable to the Chief of Staff and other officers exercising military command. They had it out with me. The Army did not know about it; of course not. I have some very vivid recollections of what took place, and I will assure you that a lawyer's case, or a soldier's, if he wants to call my place a soldier's place, was a very uncomfortable one, if you were actuated by an ordinary sense of your duty and a desire to do justice when up against this all-powerful power of military command.

But after the armistice the Judge Advocate General returned again to the office and more largely assumed the reins, and the first thing that the Judge Advocate General of the Army did again was to relieve me from all contact with and supervision of military justice. The truth of the matter is, of course, that he and the department did not like my liberal views. They will not say it, but their conduct speaks far louder than any words.

I was relieved when he came back the first time, of course, with the knowledge of the Secretary of War, if not at his suggestion. I was relieved again, the first thing, when he came back the second time. I was kept in charge of contracts and all other legal matters of the War Department except the one in which I was most interested—military justice. I do not say I was the most competent; I say that I

was the most interested in this human thing that I started out very interested in, and that I am interested in it yet.

After the armistice the punishments got worse than before the armistice.

Senator CHAMBERLAIN. You mean the sentences or the punishments?

Mr. ANSELL. The punishments and the sentences. Why, there seemed to be a contagion all over the Army of these terrible punishments, stimulated perhaps by the fact that after the fighting there was a let down, I suppose. Men go away without leave more frequently then. I do not mean to say that there is any great increase of vicious conduct; that is not so; but there is less observance of these thousand and one military exactions after an armistice, as we may appreciate.

Senator LENROOT. You mean the morale is lowered?

Mr. ANSELL. The morale of that particular type; not morale of any substantial type, I think, Senator. That is, there was no more felonious conduct then. There were no more gross breaches of the military obligation then. There was more absence without leave, more going without pass, and probably there may have been some let down in dress—I have seen that—and to that extent a lowering of morale.

Observing this increasing harshness, from the cases that passed over my desk, I began to send to the chiefs of division and have them present to me the cases from the various camps here in the United States. I observed that the curve went away up on arbitrary punishment; and on a certain day, which was the Thursday before the 11th day of January, I got the cases from Camp Dix, commanded by a major general of the Regular Army who had been Chief of Staff who had been honored by the commander in chief with every gift that can come to an officer of the Army; an old officer with great experience; and those punishments, those proceedings, approved by him, were so shocking not only to me but to gentlemen of the office, one particularly, the Chief of the Division of Military Justice, an old-time Regular Army officer, who believes in the rough-and-ready type of justice, and who disagrees, therefore, with me—that I knew something had to be done, and I had to start in again; an unpleasant task.

I went to the Judge Advocate General of the Army. I told him about this, and in the earlier conversation I got the impression that he concurred with me; but later in the afternoon of the same day he sent for me and told me that my views apparently were looking to general clemency, and I said that was true; I was convinced that something had to be done, first to restrain the aggravated tendency to severer punishments and also to investigate all of our punishments during the war. He said that he was at first impressed with my suggestion, but it would be, he feared, an impeachment of the military judicial machinery, and that he was reluctant to take action.

Finding myself, three days after that, in charge of the office——

Senator CHAMBERLAIN. When was this?

Mr. ANSELL. This was on the 11th of January last. Finding myself in charge of the office and observing that very morning further and impelling evidence of what was happening in the field, and being in charge of that office by reason of the fact that the general was away,

I addressed a memorandum to the Secretary of War calling his attention to the situation, and I put a copy of it, of course, on the Judge Advocate General's desk. Of course, I shall be accused of having taken advantage of the absence of the Judge Advocate General in doing this, but I am not concerned with the accusation. I did, in a sense, take advantage of it, because the thing had to be brought to somebody's attention, and I had not succeeded. But exigent action was needed, because there was evidence that very morning of orders that had been published by two commanding generals in this country to the effect that all absences without leave of four days' duration would be punished by general court-martial, and conveying instructions that where a case of absence without leave was referred to a general court-martial, as all of them by this order were, it was for the purpose of seeing that the delinquents got proper punishment. That means to say that absences, however trivial, could not be referred to a special court, because the limit of the punishing power of a special court was six months' confinement and forfeiture of six months' pay; so that, of course, under the commands of these two generals, courts were instructed to punish all absences without leave, however trivial, with greater punishment than six months' confinement and forfeiture of six months' pay.

Senator LENROOT. I would like to ask you, there, General, is that in your view, as an example to the Army or as to its deterrent effect upon the men as a whole, a more severe punishment than six months' confinement?

Mr. ANSELL. Senator, it is I know contended by the War Department now that these large punishments, harsh in terms at least, were imposed by the Army in terrorem. That is no defense of the punishment. That is what this War Department defense, published under date of March 10, says about it. That is what the Kernan board says. The Kernan board says it is a wonderful method of maintaining discipline in the Army. That is, they say that at the time these sentences were imposed, no human being ever intended that they should be served. They say that you had these green men; that you had to make soldiers out of them in a very short time, and it was necessary to—they do not use the word "terrorize," but it is aptly descriptive of the method and of their meaning—absolutely necessary to terrorize these men who had just come from the farms and factories by making them believe for the time being that if they batted their eyes, or did this, that, or the other thing, they were up against it. Now, surely it is a perversion of the sacred functions of courts and justice to bluff like that.

But, secondly, is it not bound to be destructive of its own silly purpose? I use the adjective "silly." Will we be permitted to do it in the next war? Will we be permitted to do it now? When will we come to lop off these sentences? Because then the men will know. Is it not like hanging up a scarecrow in a field to scare the birds? If you can not successfully disguise it the birds are soon going to use it as a perch.

Do you believe, can anybody believe, that the whole commissioned personnel of the Army of the United States could have adopted as a policy the imposing of long sentences as a bluff, without the enlisted men at the same time knowing that it was a bluff? But assuredly the sentence will have to be served in such a case, whether it is one year

or 99 years—and there have been 99-year sentences—unless somebody with interest enough and power enough and personality enough comes along and sees that they are curtailed.

Senator CHAMBERLAIN. But there is the stigma of conviction of crime.

Mr. ANSELL. Oh, yes, We are just talking about clemency; because I thought that suggestion was in the Senator's question, that the man was properly convicted.

How about these long sentences that are shocking to our conscience and sense of justice, if they are intended to be served? The War Department says they were never intended to be served; that they were imposed just simply to terrorize these men; that you got discipline and obedience by instilling this great fear.

But if the Army was intent upon handing out these long sentences, for such a purpose, ought not the Acting Judge Advocate General of the Army, I, to have known about it? I never heard that this was the policy, and I would have advised against it if I had so heard. Was it not incumbent upon the general who organized the service with that intent, to see that those sentences should never be served? Was it not his duty after flagrant warfare ceased to institute some sort of procedure whereby these punishments would be curtailed? The man who did institute the procedure was myself, a man who was not aware of any such policy or purpose, if such existed, and a man who had had to fight to get such clemency as we had already.

Senator LENROOT. What I had in mind, General, was this, in my question: It will be admitted, I take it, that punishment is necessary.

Mr. ANSELL. Yes.

Senator LENROOT. To enforce discipline.

Mr. ANSELL. Yes.

Senator LENROOT. Now, what I would like your opinion upon is, in a case of absence without leave, in the general class of cases where there is no question of guilt, whether trial by special court with a maximum sentence of six months would be sufficient for disciplinary purposes?

Mr. ANSELL. Oh, pardon me, sir. My opinion is that ordinarily it would be ample; absence without leave being distinguished, of course, legally and in substance from desertion.

Senator LENROOT. Oh, I understand; yes.

Mr. ANSELL. The absence without leave would have to become very flagrant, and more general than I think could be humanly anticipated, to make that penalty insufficient; there would have to be a disintegration of the Army before that punishment would be insufficient for a man who was gone, under circumstances that would indicate that he was not a deserter, less than 10 days, which is the presumptive period changing absence without leave into desertion. A man under ordinary circumstances goes absent without leave a maximum, say, of 10 days. It seems that our ordinary sense of justice would say that if you took that man and put him in imprisonment, in close confinement at hard labor, for six months, and made him forfeit all his pay for six months, he would pay pretty dearly for his absence.

Senator LENROOT. That might be, so far as the individual was concerned; but a man purposing to absent himself without leave,

would a knowledge on his part that the maximum punishment was imprisonment for six months and forfeiture of pay for six months be sufficient to deter him?

Mr. ANSELL. In my judgment, Senator. One man's judgment would be as good as another's; but if I may speak out of what little experience I have had in the Army, I would say ordinarily that an absence without leave of the maximum of 10 days should not bring more than one month's confinement; and I would say that my experience in the Army was probably the result of observing a sensible application of punishment. Nobody has ever heard of adopting anything like six months' imprisonment and forfeiture of six months' pay for an ordinary absence without leave.

Senator CHAMBERLAIN. They do not ordinarily give that much?

Mr. ANSELL. Oh, no. Absences without leave are treated very lightly. I do not know what the maximum limit of punishment in time of peace is, but I know that it is very light. I know that I have on some occasions had just some little reason to wonder if a man who wanted to take a little fling would not take it and say, "I am not going to get very much out of it," under the old peace-time maximum limit. We do not have very much absence without leave.

Senator LENROOT. Then is it your opinion—I am not speaking now of excessive punishment, but is it your opinion—that the order sending all these cases before a general court-martial where the punishment would be more than six months had no beneficial effect upon discipline?

Mr. ANSELL. I think it had a very injurious effect.

Senator LENROOT. That would be the extreme sentence, of course. What would have been the result of the fact that six months was the maximum punishment instead of 20, 30, or 40 years?

Mr. ANSELL. It would have been not only the subject of comment, but comment indicative of the general view that it was arbitrary, though not necessarily harmful.

Senator LENROOT. Even though the maximum punishment of a general court-martial for absence without leave had been one year?

Mr. ANSELL. Oh, yes; I will go so far as to say six months, Senator. That is to say, the general sense of the necessity of maintaining discipline in the Army through punishment, determinative of the length of punishment, would have been shocked by saying that they should all have been punished by sentences of six months, or generally punished by a sentence of six months. When you come to consider the span of man's life and the part of it that he usually spends in war—the arms-bearing man—taking three-year enlistments for instance, six months takes a pretty big gouge out of that, and six months is a pretty long time to put a man in confinement and work him at hard labor, and then take away every cent of his pay. The punishment is pretty heavy. If we had that in civil life, it would be considered a pretty heavy punishment. But I have no hesitancy in saying to you, Senator, that I have seen no evidence of such a contagion of absence without leave, or any such reasonably contemplated injurious effect of absence without leave, as would justify any military commander in saying to his court-martial agencies, assuming that he ought to have that power, that all these people now should be punished with more than six months.

I submitted this memorandum to the Secretary of War on January 11, and I would like to read that memorandum into the record. I will put all these memoranda, if I may, in the record, that evidence these administrative phases, as I go along.

Senator LENROOT. Yes.

Mr. ANSELL. (Reading):

ANSELL EXHIBIT R.

JANUARY 11, 1918.

Memorandum for the Secretary of War:

1. I have just finished reviewing the general court-martial cases from Camp Dix, under General Orders, No. 7, which has been presented to me to-day by the Chief of the Military Justice Division of this office. Those cases relate, of course, to that command alone, but I fear and have reason to believe that they evidence a situation that is much more general. This condition is directly due to a failure upon the part of the court-martial—a failure which in this case appears to be absolute—to appreciate the high character of their judicial functions and a similar failure upon the part of the convening and reviewing authority. Under the limitations of law, regulations, and orders, as construed in the War Department, this office was limited to advising the reviewing authority as to whether the record of trial was "legally sufficient to sustain the findings and sentence of the court," and was not otherwise concerned with the quantum of punishment; this upon the view, of course, that the jurisdiction of the convening authority is final and beyond review. Nevertheless, impelled by the irresistable evidence found in the great number of unjust sentences passing through this office, I have presumed, with a hesitation which the delicacy of the situation demands, to invite the attention of convening authorities to the great severity of the punishment in those cases in which the punishmen has appeared to be so disproportionate to the offense as to shock the conscience. In the light of what is transpiring at Dix, and doubtless elsewhere, I do not regard that such an administrative course taken in specific instances is sufficient to achieve and establish military justice.

2. The cases to which I now invite your attention have all come to me to-day as a part of the day's work. The officers who have handled them in this office and I are of one mind as to what they reveal and as to the necessity for the application of curative measures. I will give you a brief summary of them:

(*a*) In the case of Pvt. Sanford B. Every, 49th Company, 13th Battalion, 153d Depot Brigade, the accused was convicted simply of having a pass in his possession unlawfully. He was sentenced to be dishonorably discharged with total forfeitures and to be confined at hard labor for 10 years. The reviewing authority reduced the confinement to 3. We consider this a trivial offense, and this office will doubtless go so far as to suggest to the convening authority that, inasmuch as this soldier has already been in confinement about 2 months, the entire sentence should be remitted.

(*b*) In the case of Pvt. Clayton H. Cooley, 13th Company, 4th Battalion, 153d Depot Brigade, the accused was found guilty of absence without leave from July 29 to August 26, 1918; failing to report for duty; escaping from confinement September 1, 1918. The court sentenced the accused to be dishonorably discharged the service, to forfeit all pay and allowances, and to be confined at hard labor for 40 years. The reviewing authority reduced the confinement to 10 years. The man has evidently been in confinement since last July. Even as so reduced, the sentence is altogether too severe, and this office, in returning the record to the convening authority, will so comment upon it.

(*c*) In the case of Pvt. Charles Cino, 71st Company, 153d Depot Brigade, the accused was tried for disobeying an order "to take his rifle and go out to drill," on November 1, 1918, and on escaping from confinement on November 4. He was sentenced to be dishonorably discharged the service and confined at hard labor for 30 years, which period of confinement the reviewing authority reduced to 20. In this case, the accused claimed that he was sick, and doubtless he was suffering somewhat from venereal trouble. It may be that he was a malingerer. In our judgment, the sentence, even as reduced, was entirely too severe, and this office will so comment upon it to the convening authority.

(*d*) In the case of Pvt. Calvin W. Harper, Company A, 413th Reserve Labor Battalion, the accused was charged with desertion and convicted of absence without leave from the 12th day of August to the 13th day of November, 1918. He was sentenced to be dishonorably discharged, to forfeit all pay and allow-

ances, and to be confined at hard labor for 20 years, which period of confinement the reviewing authority reduced to 10. The period of confinement, even as reduced, is unreasonably severe, and this office will comment upon it accordingly.

(*e*) In the case of Pvt. Salvatore Pastoria, Company 36, 9th Training Battalion, 153d Depot Brigade, the accused was convicted of absence without leave from the 17th day of September until the 4th day of November, 1918. The accused testified, and in the absence of Government showing to the contrary I believe, that he went home to a young wife with a sick child, who was having considerable difficulty in keeping body and soul together. This, of course, does not justify, but it does extenuate. The court sentenced the accused to be dishonorably discharged and confined at hard labor for 15 years, which, however, was reduced by the reviewing authority to 3. I think it should be still further reduced, and shall so suggest to the convening authority.

(*f*) In the case of Pvt. Marion Williams, 58th Company, 15th Battalion, 153d Depot Brigade, the accused was found guilty of disobeying the order of his lieutenant to "give me those cigarettes"; behaving in an insubordinate manner to one of his sergeants by telling him to "go to hell," and behaving himself with disrespect toward his lieutenant by saying to him that he, the accused, did not "give a God damn for anybody." Of course, there can be no question but that such conduct can not be tolerated, but, after all, it is of a kind that appears far more serious in a set of charges than in actuality. It was a company rumpus which, in my judgment, might have been otherwise dealt with, or, under the circumstances of its commission, merited no very long term of confinement. There was no evidence of previous misconduct. The court sentenced the accused to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 40 years, which period of confinement the convening authority reduced to 10. This office will invite his attention to the severity of the sentence.

(*g*) In the case of Pvt. Lawrence W. Sims, 49th Company, 14th Battalion, 153d Depot Brigade, the accused was convicted of absence without leave from August 8, 1918, to November 20, 1918, and was sentenced to be dishonorably discharged, and to be confined at hard labor for 25 years, which period of confinement the reviewing authority reduced to 10. Inasmuch as the record suggests that this case was something worse than absence without leave, this office does not feel justified in commenting upon it to the reviewing authority. However, the long term of imprisonment is cited to show the constitutional tendency of the court to award shockingly severe sentences.

(*h*) Another case has just been handed me, that of Pvt. Fred J. Muhlke, Medical Corps, base hospital, tried at Camp Grant for insubordinate conduct, which, at worst, could not merit confinement for more than a year or so in the disciplinary barracks. The court sentenced the accused to dishonorable discharge, total forfeiture, and confinement at hard labor for 50 years. The convening authority consumed some 10 pages of his review to show that such punishment was well merited.

3. If these were isolated examples, they could be corrected, of course, without raising any serious question. But they are not. I am convinced that courts-martial and approving authorities are abusing their judicial powers in awarding and approving such sentences. Such sentences are extremely harsh and cruel. Surely no person having an ordinary sense of human justice can intend that any substantial proportion of such sentences shall ever be served. If they are awarded to be served they will bring disgrace by their shocking cruelty; if they are awarded as a sort of "bluff" they will bring sacred functions into disrepute both in and out of the Army. From every point of view they are a travesty upon justice.

4. If the courts are blameworthy, the convening and reviewing authorities are no less so. They do not instruct their courts; they approve of such sentences and permit them to stand; they abuse their powers, and decline to apply their judgment and discretion to justice, by referring cases to courts-martial under arbitrary blanket rules and without individualization. I have just been furnished with an example of this, found in a camp order which provides as follows:

"Absence without leave cases in which the offender has been absent more than 24 hours will be submitted to a special court. Cases of more than five days' absence will be submitted to a general court.

"In each instance where a case of absence without leave is referred to a court of superior jurisdiction, *the court must realize* (italics my own) that it

has been referred to such court because it is considered that an inferior court, with limited powers of punishment, can not handle the case with sufficient severity."

I have known of no more flagrant abuse of judicial power than this, and I beg to remind you that such power is judicial. Please see Runkel *v.* United States (122 U. S., 543), and Grafton *v.* United States (206 U. S., 333). There are numerous other decisions to this effect. (The Army—I believe I may be permitted to say the War Department also—fails to distinguish between functions which are judicial and functions which are purely administrative.)

This order contains, in effect, and was intended to convey, the following directions:

(*a*) All absences without leave will be tried by courts-martial.

(*b*) Those for more than one and less than five days will be punished by six months' confinement and six months' forfeiture of pay (the limit of punishing power of a special court).

(*c*) Those for more than five days will be tried by a general court and will be punished by dishonorable discharge, forfeiture of all pay and allowances, and from six months' confinement up.

5. Again I have to advise you that these are not, in my judgment, isolated examples but are evidence of more general deficiencies in the administration of military justice which I have observed, at least I believe I have observed, during this war.

S. T. ANSELL,
Acting Judge Advocate General.

The Secretary of War then asked Gen. Crowder, who had returned, what ought to be done, and they recommended the establishment of a special clemency board, which was, of course, clearly suggested in my memorandum.

Senator CHAMBERLAIN. But rather extra legal, while your proceeding might have been a legal one under your view of the law?

Mr. ANSELL. Yes, sir; still just talking of clemency.

Now, let us see how far clemency has gone to remedy the injustice; see if it has gone as far as it ought to have gone; whether the evidence of the War Department's attitude and their action indicate that the War Department has been in favor of the degree of clemency which I should think would appeal to us all as necessary, upon an examination of the records in these cases, and in view of our experience in the office. It must be remembered that Gen. Crowder had not had much experience in the office during the war; and it must be remembered, furthermore, that the Secretary of War had had none. He refers to the great number of cases that he had reviewed during the war, but obviously the Secretary of War never sees any records but these. The few dismissals of officers from the divisions, not from the department, and a small percentage of the death sentences; that is all. That is, he sees only those records, few in number, that come to the President of the United States as the Commander in Chief of the Army for confirmation. He does not see the rest of them. I should imagine the Secretary of War had probably seen less than 300 records since he has been Secretary of War, and I should say that the Secretary of War had seen less than 100 really important cases that were suggestive of an opinion upon the fate of military discipline, at all.

Senator CHAMBERLAIN. Will you at some point in your testimony put in the number of the various kinds of courts-martial?

Mr. ANSELL. I will do that now, sir—not accurate. Round numbers are usually inaccurate, but this will be close enough.

For the year immediately preceding the armistice, according to the reports that I have, there were 28,000 general courts-martial out of an Army that averaged perhaps 2,000,000. We know the size of the

Army the year before the armistice, and we know the size of the Army at the time of the armistice, and I roughly estimate it at 2,000,000 men.

In the inferior courts during the same period there were between 340,000 and 360,000 cases.

Senator CHAMBERLAIN. That is for the year preceding the armistice?

Mr. ANSELL. Yes, sir.

Senator LENROOT. Do you know, as to those inferior courts, how they were divided as between special courts and summary courts?

Mr. ANSELL. No, I do not, Senator; and we have no way of telling that, as those records do not come to us except in unusual cases. Indeed, the safeguard was created with the view of straining down from the general courts cases that we thought could be properly tried by courts of lesser jurisdiction; but the military commanders have met us with the opposite practice. A commander who believes that a summary court can not hand his man out enough, of course, resorts to a special court; so that while the policy of administration has been to bring the cases within the jurisdiction of a lower and still lower court the practical tendency has ever been to take a case triable in the summary court and send it to the special court, and so this midway court has tried far more cases than any of us had expected it would try; cases that come up that more properly belong to the summary jurisdiction rather than the general jurisdiction.

Senator CHAMBERLAIN. You have not the number of cases that have been tried since we entered the war?

Mr. ANSELL. No, sir.

Senator CHAMBERLAIN. Your figures are only for the year preceding the armistice?

Mr. ANSELL. Yes; I took that because that became the basis of discussion; and that is all I know.

Mr. ANSELL. Accordingly, the clemency board was organized within two or three weeks—a special clemency board, we will call it—which was to go back and take up cases, however long they had been tried, during this war, for the special purpose of clemency, and I was made the president of that clemency board.

There were conferences between the Secretary of War and the Judge Advocate General and the prison officials, one of which I attended, and the question arose as to whether the prisoners abroad, the number of whom nobody in the War Department knew, were to be given this special consideration also. I could see no reason why they should not be given the same consideration as our men imprisoned here at home, but it was decided that their cases should not be taken up, the reason assigned being that they were over there, in and near the theater of operations where the offenses were committed, and that people would not be so interested in extending clemency to prisoners so circumstanced as here at home; with which I disagreed. So that from the beginning we were not to include in this special dispensation prisoners confined abroad.

I have already said that I was reduced to my Regular Army grade of lieutenant colonel, and there had been put on the board, in the beginning or shortly after it was organized, Col. Wigmore, a very stanch supporter of the view opposing mine, and a man who is not

zealous in according clemency. So that when I was reduced they kept him as the senior member of the board.

My relation to the Judge Advocate General had been personally affected. By virtue of this officer's rank he became the point of contact between the Judge Advocate General and the clemency board, and instructions governing the clemency board were issued to him and not to me. Indeed, except so far as whatever personality I could put back of my position, it could be said that he was largely the clemency board.

Now, clemency is not a matter that can be accurately measured. After all, it is a matter of the heart and of the conscience; and I was very anxious to have a board, of course, that shared what I conceived to be liberal views and the proper attitude toward clemency. That board, of course, I did not get when the senior officer on it was a man ardently supporting the Crowder view and bitterly opposed to mine.

Some time in early March I observed that the clemency examiners, the officers who made the records, evidently did not understand the considerations that would have governed me in examining the records for purposes of clemency. They were deferring too much to the record. They were approaching it as they would review a record for determining errors of law, and were not taking into account what the record reflected of the human situation; not governed by those aspects, but simply by the legal determinations of the record. We were not getting very far. So far the situation between my clemency board and me had been such that I had not been in position to instruct it. They sat in one room and I sat in another, and the channel of instruction from the Judge Advocate General's office to this superior officer was not through me.

Senator LENROOT. Do I understand by that, General, that the policy was that if they found what would have been in a civil court a reversible error, they would recommend clemency, but otherwise not?

Mr. ANSELL. It was largely that; and they were pretty strict about the reversible-error proposition also. Yes, Senator; that probably expresses it as accurately as it could be expressed.

Senator CHAMBERLAIN. Wigmore was a civilian. How long had he been in the service?

Mr. ANSELL. From near the beginning of the war; but he had been in the Provost Marshal General's office. Col. Wigmore had had absolutely no experience, which he confesses in the letter he got out to the American bar as its Nestor, advising them what to do on the subject. He confesses that he had never examined but two court-martial records, which had incidentally come to him; yet he assumed to speak with Nestorian authority.

Senator CHAMBERLAIN. He was your superior on this board?

Mr. ANSELL. Oh, yes, sir; after I was reduced; so that, seeing this situation, on March 21 I asked the Acting Judge Advocate General, Gen. Kreger, that I might be permitted to instruct the clemency board, and the examining officers who made the reports to the clemency board, or at least might be permitted to present to this clemency board my views of the general principles that should govern the granting of clemency. I was moved further to do this by the fact that recently the commandants of the prisoners had been brought on here, and they

were very potential factors in the granting of clemency, because they make a recommendation in each case; and the tendency of the War Department is, of course, to support the recommendation of the prison commandant rather than, perhaps, what might be described as the more humane view of the clemency officers.

These gentlemen had been brought here, Col. Rice and others, and they and the Acting Judge Advocate General all conferred with the Clemency Board and the examiner and agreed upon some principles governing the award of clemency. I was not there, although sitting right in my room, nor was I notified of the meeting.

I wish to submit at this point in the record a memorandum for the Acting Judge Advocate General which contains my views with respect to the principles that ought to govern clemency, views which I think nobody could disagree with unless they were apprehensive because of their conception that I was extremely liberal, or there was something in the views themselves that was hidden.

Senator LENROOT. That will be inserted.

(The memorandum referred to is here printed in the record, as follows:)

ANSELL EXHIBIT S.

MARCH 21, 1919.

Memorandum for Gen. Kreger:

Here are my views, briefly and roughly stated, respecting the considerations which I think should govern the Clemency Examiners and the Clemency Board itself:

1. Clemency is not a matter to be governed by technical rules of law. It is a matter of conscience rather than strict professional judgment. It is a matter which requires us to see the human being, his motives, circumstances, and condition, and our vision in this regard must not be limited by what the record, legally considered, strictly shows.

2. Too much legal deference must not be paid to any record for purposes of clemency, and this is especially true of courts-martial records. They frequently show, what is only too frequently true, that however closely the forms of trial may have been adhered to, the trial itself was not a fair, full, and impartial presentation of the case. Speaking more specifically, I think we must ask ourselves, among many others, the following questions:

(*a*) Were the facts, as revealed on the record and as they may be fairly inferred, such as to indicate a state of mind that is really criminal or immoral, or chronically perverted, or intolerably reckless of the military obligation? Or, especially in purely military offenses, was not the delinquency due to thoughtlessness, or ignorance, or a lack of understanding of the military environment, or was it not provoked, as is frequently the case, by an unsympathetic, if not an oppressive attitude upon the part of those in authority? Frequently the two serious charges, desertion and disobedience of orders, can be so resolved, in the light of the human facts, as to indicate that there was no intention to commit the offense at all. While every charge of disobedience of orders sounds bad upon paper, very frequently the order itself was one given in a light or improper manner, or was not a necessary one, or involved some inconsequential thing not sounding in those necessitous circumstances where disobedience of orders becomes a most serious, even a capital offense.

(*b*) Accused may have counsel, but too frequently counsel is so limited by reason of his lack of legal qualification or a lack of that rank which gives him standing before the court, or a general lack of those inclinations and appreciations which zealous and competent counsel must have in order to make a good defense, that it can be said, as a matter of fact if not a matter of law, that the accused did not have the substantial assistance of counsel which every accused should have. And frequently the court will permit a man to go to trial without counsel when any man of legal appreciations knows such a course to be unwise. What is true of counsel is frequently true of other incidents of the trial.

(*c*) There is nothing that courts-martial are more inclined to do than follow a natural inquisitiveness to admit masses of hearsay testimony, and at the same time so limit the counsel as to prevent proper cross-examination where, as is none too frequently the case, the counsel is inclined to indulge in one. Military counsel often hesitate to cross-examine superior officers, and courts-martial as a rule seem to think that it is improper to test a witness, especially if he is a superior officer, for bias, prejudice, or credibility.

(*d*) Special attention must be paid to improvident pleas of guilty. Frequently the entire case is given away by such a plea made by an accused without counsel, or advised by incompetent counsel; and very frequently, after such a plea, the accused makes statements in his own defense inconsistent with the plea, which courts as frequently disregard. Pleas of guilty of serious offenses should be most carefully scrutinized. Court-martial duty is uncongenial, and a plea of guilty is acceptable as a brief method of ending the trial.

(*e*) Of course, as a technical matter, every presumption should be made in favor of the action of the court, but frequently the action of the court, however it may appear in mere form, is not fair and its conclusion is prejudiced thereby.

(*f*) We should be on our guard against confessions or statements of any kind against interest, when made by a soldier to a military superior. The military relation is such as to induce confessions in such a way as to render them incompetent.

(*g*) I do not regard that the thirty-seventh article of war changes the rule with respect of the effect of prejudicial error, but simply redeclares it. Substantial error, in my judgment, must be presumed to affect the finding and sentence. As between evidence of the same degree of credibility, it may be that the effect of evidence erroneously admitted may be overcome by an overwhelming volume of evidence of such a nature as to compel the mind. But, for instance, take a confession which when worthy of belief is the most convincing of all evidence, if it should be improperly admitted, I should conclusively presume error.

(*h*) I observe that it is frequently said in the clemency memoranda that the evidence is sufficient to sustain the conviction. Evidence may be sufficient to sustain the conviction when tested by an appellate court for its purposes, and yet be so weak and unsatisfactory as to justify clemency. The tests and purposes of the tests of the evidence in two cases are entirely different.

3. I believe that the great principles fundamentally established in our civil jurisprudence, designed for the purpose of securing a fair trial, are equally applicable, except where clearly withheld, to trials before courts-martial. A military accused is entitled to the same full, fair, and impartial trial; to be informed of the nature and cause of the accusation; to have the facts against him determined by the usual rules of evidence; to have witnesses in his favor; to be confronted with witnesses against him, except in those cases where the rules of evidence reasonably prescribe otherwise; and, above all, he is entitled to the assistance of counsel for his defense, counsel that should represent him and his cause, and not simply appear in the trial to satisfy a form of law. And a military accused is fully entitled to protection against self-incrimination, as much so as an accused in a civil court.

4. The Articles of War and the military statutes are not the sole source to be sought in determining whether or not a man has had a full, fair, and impartial trial. The fundamental principles of law which are a part of the common law and now a part of our Constitution must be resorted to and applied, except where by their very nature they are inapplicable to military proceeding.

5. I think our tendency should be, wherever we can justify it, to get rid of that kind of punishment which is continuing and damns a man forever, such as a dishonorable discharge. Such a punishment as that should be given only in extreme cases. It has been given altogether too frequently and we should lean toward finding a way to reduce that kind of punishment. In the ordinary case we should try to restore a man to the colors or return him to civil life without marking him so he can never rehabilitate himself.

If you should approve of these views, I think you should instruct the examiners and the board accordingly, or authorize me to do so.

S. T. ANSELL.

Mr. ANSELL. I heard nothing from that, though I had really thought I would hear almost immediately. I knew there were conferences between the Acting Judge Advocate General and the new

senior officer of the board, Col. Easby-Smith. Col. Wigmore had been relieved and reassigned to duty at the Provost Marshal General's office. But an officer of equal rank and my superior, a new officer, incompatible with me and my views, was assigned, vice Wigmore, relieved. That officer was Col. Easby-Smith, who, if possible, is even more pronounced in opposition to my views, both in regard to the system of justice and the clemency that we were undertaking to award, so ardent a champion is he of the Judge Advocate General.

Senator CHAMBERLAIN. He was a civilian also?

Mr. ANSELL. Yes.

Senator CHAMBERLAIN. He was a lawyer here in the District of Columbia?

Mr. ANSELL. Yes. He had not been on duty in the Judge Advocate General's office and he knew nothing about this matter. So that I addressed on March 24 another memorandum to Col. Kreger, which I would like to read. It is brief, and I would like to have that inserted in the record [reading]:

ANSELL EXHIBIT T.

MARCH 24, 1919.

Confidential memorandum for Gen. Kreger:
Subject: Clemency.

1. I request that I be given full authority to direct the Clemency Board and the examiners in the matter of the proper methods to be used in examining the records—those matters of record or omissions from the record which may properly be considered as indicia of clemency, the general principles that should govern clemency, and, equally important, that I be consulted in the selection of the personnel engaged in clemency work. Otherwise I must advise you that I must disclaim all responsibility for results and you and others must assume it.

2. My name has gone to the public in such a way as to indicate that I am in charge of the examiners and the board and that my views in general govern. This is far from accurate. The administration of this office in respect of this most important matter has been laid down so as to hold me responsible and yet to deny me the necessary freedom and authority.

3. Because Col. Easby-Smith is my senior by one grade, which in itself is embarrassing, because his views as to clemency and his attitude to the subject generally so differ from mine as to result in obstruction, and because I lack for him the official regard which I should for the senior member of the board, I ask that he be relieved from duty with it.

4. I also believe that the special board of review exercises such a restraint upon a fair examination of the records as to be obstructive of proper clemency. I request that you direct the special board of review, the Clemency Board, and all clemency examiners to report to me for instruction, and that I be consulted hereafter in assignments of officers to duty in connection with clemency work.

5. I would have you know that nothing is farther from my desire than to embarrass you, but my own protection and a proper regard for my duty require me to say to you this much.

S. T. ANSELL.

I referred there to a special board of review over clemency. The system of examining records for clemency consisted in having an officer examine the record and then report to the clemency board, consisting usually of four or six officers, divided into two or three divisions, each division of two officers, of which I was nominally the president, and obviously, at least from my viewpoint, one great element making for clemency was the poor quality of the trials. A man may have had counsel, nominally, but when you look over the record, its poverty speaks louder than words. You may find that the counsel sat there, and everybody sat there, and saw the case poorly developed; so that the record, however technically dependable,

was as a human document unreliable. That was an indication for clemency, especially, when it would appear that the omissions or the particular slant given by the method of presentation was operating against the accused.

The War Department did not wish to impeach or impugn the integrity of these records; but I insisted that there should be printed on the clemency examiner's report certain questions: "What do you think of the trial in this case, and why? Who represented the accused? What kind of defense did he put up? What do you think of the case in general?" Now, these were young officers, militarily ambitious; properly so, doubtless. If they reported a case "poorly tried," that suggested clemency. Of course if the case were reported "well tried," there was lacking in the case the element of clemency; but quite the contrary, if it had been poorly tried. A case poorly tried, so far as the trial is concerned, does suggest clemency.

The Judge Advocate General organized this special board of clemency review consisting of three lawyers chosen, as I say, especially because they reflected absolutely the views of the department and the Judge Advocate General. Seldom or never could that board find a case poorly tried. They were all well tried. So that every case that the clemency examiner reported as poorly tried went to this clemency board, when they would report back to the Judge Advocate General, frequently in language characterized by brusqueness and unjudicial temper. They would say "It is absurd to say that this case was poorly tried. The examiner who made that statement evidently did not make a thorough examination of the record. No court in the land would say that that case was poorly tried. It should be sent back to this officer with instructions to look over his work again." Now, to a civilian that may not appear to be more than a mere difference of opinion as to the quality of a record; but to the military man, here are all these men in what we call the pit, working as hard as they could, getting out thousands of records. When a man put "poorly tried" on a record he knew that was going to be viséd by a set of men who did not want to see the "poorly tried" maintained. If he reported "well tried," of course that went through.

Now, I say that one of the principal obstacles to getting a fair estimate of the record was to be found in that fact that the Judge Advocate General organized this separate board of review, of high ranking officers, with special authority to supervise the work of the clemency examiners, whenever there was found an element in the records that made for clemency, but never to supervise when there was found a record not making for clemency.

Senator LENROOT. Was there ever a difference in the treatment of the records of trials of men and officers?

Mr. ANSELL. A world-wide difference, Senator. You let an officer be tried, and there is a straining of energy from the time the original investigation begins. You let a charge be made against an officer, and the whole system lines up really to see that there is an absolute necessity of trial or there will be none.

The Inspector General's Department goes to work and inspects, and inspects, and inspects; and reports, and reports; and then the judge advocate of the convening officer's staff investigates with the utmost care, and the commanding general really is only too glad to

find a way of letting the officer out; and when you come to the court every presumption in the world is in favor of this officer, if he has been an officer in good standing; and so it is throughout the entire procedure. And when it gets to our office there never has been a time, no matter what the personnel was, when there was not the most thoroughgoing, careful review of every officer's case, with a distinct, palpable disposition to find all fault possible, and to reduce as much as possible the importance of everything against him. I say here, with the keenest sense of my responsibility in making the statement, that an officer and an enlisted man in our establishment do not at all get the same kind of justice. I say that they stand at opposite poles. Every presumption is made in favor of the officer. There is a thoroughness of trial that we do not find elsewhere. Our treatment of the enlisted men is to run them through the mill.

Senator LENROOT. In the case of proven guilt of an officer and enlisted man for the same offense, is there a different degree of punishment?

Mr. ANSELL. Yes, Senator. Let us take the Army estimate of dismissal for an officer and dishonorable discharge for an enlisted man. There may be some difference in the two punishments, but they are so nearly analogous that I think we can discuss them and, by way of contrast, answer your question.

You are an enlisted man. You do not belong, as a rule, to the same class—if we are ever justified in talking of classes; and you talk it in the Army, the Lord knows! An officer is apt to be a better educated man, and better circumstanced, with more influence. We all know that the enlisted man is apt to be of the humbler type; not always, but apt to be. Both are found guilty. The trials differ as I have indicated. Let us suppose that the officer gets dismissal. The corresponding punishment in the case of the enlisted man is dishonorable discharge. I say to the committee that both of those punishments are ruinous; they are destructive of all capacity in a human being to rehabilitate himself. I have known of few men in this world who have left the Army with a dishonorable discharge or dismissal that they did not go down and out, and never come back. Few, if any of them, ever get back. One such officer was in my office in the last few days. That man was a fine officer. He made what I should conceive to be only a slight mistake, but the powers had lined up against that man to railroad him out of the Army. That man has striven and striven and striven until he has come back in civil life; but, though a young man, younger than I am, he shows what has happened to him. His hair is white as snow and his face is filled with the wrinkles that belong to 80 years of age. If this man had not had great stamina, he never would have come back.

Take an enlisted man in his situation. He is less apt, still, to come back. When the enlisted man is tried we in the Army try to make his punishment as severe as possible. We follow a man who has gotten a dishonorable discharge wherever we can, and we give him this yellow sheet, and then we try to prevent his employment anywhere in this world.

Senator LENROOT. Just elaborate on that, will you, a little?

Mr. ANSELL. One came to me the other day. He had gotten employment, I think, on a trolley line—something—in southern Cali-

fornia. An officer of the Army, hearing that this man was there, notwithstanding the fact that the man was doing well as a conductor or motorman, reported to the company, to the management of the company and said, "This man has been fired out of the Army as a bad egg. You do not want him. It is our policy in the Army to try to see that those men are known for what they are—unfit to serve their country in uniform." I do not believe the manager wanted to do this, but nevertheless we all know business management. That man was fired—dismissed.

These punishments, Mr. Chairman, are lifelong. They last, and the department intends to make them last as long as the victim draws the breath of life. He is tagged; he has the yellow sheet; he is followed, and wherever the Army is known he is apt to be known, and the influence of the Army will be used to prevent his successful efforts at rehabilitation.

Senator LENROOT. Do I understand that the action of the officer you refer to was in line of duty?

Mr. ANSELL. Common understanding; yes. Not in the line of official duty, in a strict sense, no; but common understanding, yes. I say that emphatically. Why, an officer of the Army dismissed, as I say, for a mighty slight offense—at some more convenient moment, if I can find the time, I am going to try to present that man's case to this Congress and show this Congress that the man was unjustly treated and he ought never to have been dismissed from the Army. Yet that man, when we got into the war, wanted to supply a post with some commodity, maybe fish or vegetables, which he was able to supply, and which he was supplying through a contractor. The commanding officer of that post, observing this poor fellow dragging a load of fish, or cabbage, or what not, into that post for the supply of the troops, recognized that he was this military pariah. The commanding officer made inquiry and found out that the victim was supplying this contractor with this provender, and the post commander called up the contractor and told him that he would have to fire this man. The man was brought up in the presence of the contractor, that the post commander might identify him with assurance; and the post commander, in that authoritative way that men with great power have, just simply said, "That is the man;" and then the contractor took the man outside and said, "I am sorry; you have been a good man; you have worked hard; you have done well for me; but I will lose my job if I do not fire you." Of course, you have got some suggestion of that in the Articles of War themselves. At least one article forbids any association with convicted men. But I am referring to a common understanding—a tradition, if you please; an element of esprit de corps. Obviously you would not expect officers and men of the Army to exist on terms of social and official equality with men convicted; but the point I am making is that there is an affirmative effort to do injury that is lifelong.

Now, dishonorable discharge, if you are an enlisted man, means just as much to you as dismissal from the Army means to me if I am an officer. But I want to assure you that the Army does not so regard it. The Army takes into consideration the social standing of the officer—what it means to be an officer with the badge of sov-

ereign authority on you. It is a wonderful thing, really, to be an officer of the Army. They say that if you destroy that man's tenure of office and throw him out into the world in disgrace in a material way you have destroyed a lifetime vocation and livelihood. You have thrown him from a place of honor than which none is higher, because, no matter what the attitude of our people may be to the Army as such, there is no people in the world who hold an Army officer in higher esteem as an individual than the American people.

"And see what the man has suffered," they say. "Here upon this very pinnacle of pride and popular appreciation, and cast out. Therefore, we are not going to give the punishment of dismissal except in the most flagrant case." And that is generally true. But dishonorable discharge—I do not want to criticize our Army unfairly, and I will not do it, but I must speak truthfully as I know the truth to be—dishonorable discharge is regarded as a sort of perfunctory thing. It is but part of a formula. The language runs, "dishonorable discharge from the service of the United States Government and confinement for four years with forfeiture of all pay and allowances." It goes right along. In fact, when you give a man more than six months' punishment you must give him dishonorable discharge. It is an easy thing. Now, they say that dishonorable discharges may be remitted. May I say to you, sir, that in all convictions in the year immediately preceding the armistice—or, I will give you some statistics. Statistics are devitalizing, as a rule, but they are interesting in this case.

Out of every 100 sets of charges drafted by an officer against an enlisted man between 96 and 97 were tried.

Of every 100 trials by general court-martial the year before the war, just a little less than 90 per cent were convicted; and in the old Regular Army before the war 96 were convicted year after year and year after year.

Get the full import of that! An officer here, under no special obligation, acting simply upon his responsibility as an officer, prefers a set of charges against a man, and 96 out of a hundred are tried, regardless of all this talk of investigation by the War Department; and of every 100 tried 96 are convicted; and out of every 100 convicted, 64 of them are given the sentence of dishonorable discharge.

Now, they say, "Oh, we suspend the sentence." But in the last statistics, the year before the armistice, those statistics showed that 48 out of every 100 men tried by general court-martial did get dishonorable discharge, notwithstanding all their talk.

Senator CHAMBERLAIN. They do not suspend them?

Mr. ANSELL. Yes; they do now.

Senator CHAMBERLAIN. Do they now?

Mr. ANSELL. Yes; under your act. Yes, they do; but many are not suspended. But I will tell you something else about the suspended dishonorable discharge that so much is made of. In connection with this power of review that we have under General Orders, No. 7, if a commanding general does not wish a sentence of dishonorable discharge to be reviewed, all he has got to do is to suspend the sentence for the time being, because under the terms of General Orders, No. 7, it is only an executed sentence of dishonorable discharge or a sentence of death that is reviewed; so he can suspend it

to-day and thereby obviate any review of the case, and then come along to-morrow and vacate the suspension, and that is the end.

Now, Mr. Chairman, these statistics, I hate them, but they are interesting; and they are interesting when you look at the old Regular Army. They are trying to say this is a new thing, all these terrible punishments. Why, Mr. Chairman, the condition of things in the Regular Army with respect to the injustice done through courts-martial was far worse than it has been in this Army; far worse. There were fewer charges and fewer convictions and fewer dishonorable discharges in the new Army. Why, do you know, if we had preferred as many charges in this new Army, per capita, as we preferred in the old Regular Army we would have had this appalling result: If we had applied the ratio of Regular Army trials to the new establishment we would have had 125,000 general courts-martial and 1,300,000 inferior courts-martial, surely a number that would have destroyed any army. Every year that I have been in the Army of the United States the number of men convicted by general courts-martial every year out of every 100 was not less than 5, and usually 6. Think of it! Six men out of every hundred every year are tried, and more than half of them discharged dishonorably from this Army. Three-year enlistments, 18 out of every 100. Four-year enlistments, 24 out of every 100.

Now, they have argued that these deficiencies have been demonstrated in the new Army, and that they have been due to the fact that the new officer is an inexperienced officer, and that he has been oppressive; clad with a little brief authority. How is that reconcilable with the fact that there has been such a smaller proportion of courts-martial in this war army; that there has been a preceptible smaller percentage of convictions?

Senator CHAMBERLAIN. How do you account for it?

Mr. ANSELL. From the fact, largely, that the new officer had not become completely divested of his civil sense of justice. He endeavored to put up with these men without resorting to the Regular Army method of preferring a charge every time a man did something. I speak out of my experience as Acting Judge Advocate General during this war and say to you, sir, that the harshest courts during this war in this Army were courts presided over or controlled by Regular Army officers.

Senator LENROOT. Do you not think that while we were at war there was a higher spirit among the men—a better morale?

Senator CHAMBERLAIN. And there was a better class of citizens in the Army.

Senator LENROOT. Yes; a better class of men.

Mr. ANSELL. That you had a better class of men, I think we must concede. After all, it was a segment of our citizenship, not all the best, but of very high character; the highest grade of personnel that I think any army in the world ever had, and I profess to be something of a student of military history. But let us not get the idea that the old-time regular was a sort of roustabout. He may have been once. But any man that has ever served with regular troops is conscious of the great loyalty of those men, of their great zeal in the performance of their duty, and their capacity to render blind obedience to the Regular Army.

We did have a better type of men in this army; but, on the other hand, you want to remember that there were immeasurably greater opportunities for violating the regulations. Take a boy brought up at home—take me, for instance. I think they have never regarded me down home as a general. I am still what I was to them. They do not understand these new shoulder straps. They have never seen me in my shoulder straps. If I had spoken to one of those men from my home a little sharply it would have been an extremely likely thing for him at first to hand it back to me as he got it. Take a boy taken right off the farm and put him into that army, without the regular preliminary course of training we give to an enlisted man in the Regular Army. We put the new men right into it. They were civilians yesterday. Take a man that came from my home, a rather rural, backwoods place, who never saw a rifle before and knew nothing about the Army; they took those "tar heels" and put them right into camp, absolutely green men. Then you have an officer come around among those men and begin to talk to them in this ultra-authoritative way; it is a wonder that there had not been more derelictions than there were. These new men needed not punishment at that stage of the game; they needed but instruction and sympathy. There was time in the days of peace to instruct the Regular Army men, but there was no time to instruct these men, and you should not hold them up to this high exaction.

I think, Mr. Chairman, it is an unworthy argument to place the blame on the new officers; first, because it is untrue. It is untrue, and I say this speaking from the record; and I have no reason to hold a brief for any new officer. The new officer is not responsible for the harsh punishments. And here is a clinching argument to show that that argument is not true. You can count up on the fingers of these hands every National Guard officer and every National Army officer who exercised general court-martial jurisdiction. You know that, sir. You know your army commanders and division commanders and department commanders were Regular Army officers, naturally. They were the professional soldiers and they went to the top. But nothing less than, nothing of lower rank than, a division commander can convene a court-martial, and pass upon its judgment, except in some special case where the President of the United States specifically endows a junior officer with authority for a special purpose.

Who, then, in the last analysis, was responsible for the great number of trials—there were too many—and the harsh punishments resulting from those trials, if it was not the man who took the charges and ordered them tried; and then who approved the punishment, and who at any moment of the proceeding could have cut it down? How do they escape that? How can anybody escape it?

The Regular Army is a wonderful institution. We all know its history. But, in heaven's name, let it appreciate one fact, that is, regular armies are not going to fight the battles of this country. We are going to fight the battles of this country with armies just exactly like the ones we have just had. We are always going to do it, unless it is some opera-bouffe affair.

Now, if it were true that the deficiencies of or evils of the administration were due entirely to these new officers, is it not up to us to

protect the institution and the men of the institution from a situation that is as inevitable as that? Must we not restrain the man clad with a little brief authority? Of course we must. We get nowhere by saying that it is due to the fault of these people, when we must inevitably have them. If it is due to the fault of those people, then by law we must restrain them.

(At 12.30 o'clock p. m. the subcommittee adjourned until Friday, August 29, 1919, at 10.30 o'clock a. m.)